

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MIGUEL LOPEZ,)	NO. CV 08-2872-CAS (E)
)	
Petitioner,)	
)	
v.)	ORDER ADOPTING FINDINGS,
)	
J.F. SALAZAR, Warden,)	CONCLUSIONS AND RECOMMENDATIONS OF
)	
Respondent.)	UNITED STATES MAGISTRATE JUDGE
)	
)	
)	

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition without prejudice.

///

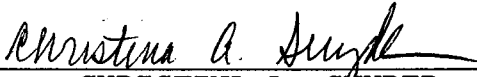
///

///

1 IT IS FURTHER ORDERED that the Clerk serve copies of this Order,
2 the Magistrate Judge's Report and Recommendation and the Judgment
3 herein by United States mail on Petitioner and counsel for Respondent.
4

5 LET JUDGMENT BE ENTERED ACCORDINGLY.
6

7 DATED: August 12, 2008.
8

9
10 
11 CHRISTINA A. SNYDER
12 UNITED STATES DISTRICT JUDGE
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 MIGUEL LOPEZ,) NO. CV 08-2872-CAS (E)
12)
13) Petitioner,)
14)
15) v.) REPORT AND RECOMMENDATION OF
16)
17) JOHN F. SALAZAR, Warden,) UNITED STATES MAGISTRATE JUDGE
18)
19) Respondent.)
20)
21)
22)
23)
24)
25)
26)
27)
28)

18 This Report and Recommendation is submitted to the Honorable
19 Christina A. Snyder, United States District Judge, pursuant to
20 28 U.S.C. § 636 and General Order 05-07 of the United States District
21 Court for the Central District of California.
22

23 PROCEEDINGS
24

25 Petitioner filed a "Petition for Writ of Habeas Corpus By a
26 Person in State Custody" on May 1, 2008. Respondent filed an Answer
27 on June 2, 2008. Petitioner filed a Reply on June 25, 2008.
28

///
28

1 **BACKGROUND**

2
3 The Petition attempts to challenge under federal law the
4 involuntary out-of-state transfer of California state prisoners.
5 Petitioner has not yet presented any such challenge to the California
6 Supreme Court (Petition at 2-8).

7
8 **DISCUSSION**

9
10 A federal court will not grant a state prisoner's petition for
11 writ of habeas corpus unless it appears that the prisoner has
12 exhausted available state remedies. 28 U.S.C. § 2254(b) - (c); Reese
13 v. Baldwin, 541 U.S. 27, 29 (2004); O'Sullivan v. Boerckel, 526 U.S.
14 838, 842 (1999).¹ State remedies have not been exhausted unless and
15 until the petitioner's federal claims have been fairly presented to
16 the state's highest court. See Castille v. Peoples, 489 U.S. 346,
17 350-51 (1989); James v. Borg, 24 F.3d 20, 24 (9th Cir.), cert. denied,
18 513 U.S. 935 (1994). A claim has not been fairly presented unless the
19 petitioner has described in the state court proceedings both the
20 operative facts and the federal legal theory on which his claim is
21 based. Duncan v. Henry, 513 U.S. 364, 365-66 (1995).

22
23 Petitioner has the burden of demonstrating he has exhausted
24 available state remedies. Lambert v. Blackwell, 134 F.3d 506, 513 (3d
25 Cir. 1997), cert. denied, 532 U.S. 919 (2001); Matthews v. Evatt, 105

26
27 ¹ Contrary to Petitioner's argument, Congress has not
28 "abrogated" the exhaustion requirement with respect to the type
of claims Petitioner alleges.

1 F.3d 907, 911 (4th Cir.), cert. denied, 522 U.S. 833 (1997); Parra v.
2 San Jose City, 2003 WL 22384775, at *1 (N.D. Cal., Oct. 8, 2003);
3 e.g., Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981), cert.
4 denied, 455 U.S. 1023 (1982). Petitioner, who does not allege he has
5 presented anything to the California Supreme Court, plainly has failed
6 to carry his burden of demonstrating he has exhausted available state
7 remedies.

8
9 Petitioner still may be able to present his claims to the
10 California Supreme Court. See, e.g., In re Alcala, 222 Cal. App. 3d
11 345, 352 n.4, 271 Cal. Rptr. 674 (1990) ("A petition for writ of
12 habeas corpus is an appropriate vehicle for persons lawfully in
13 custody who seek to vindicate rights to which they are entitled while
14 in confinement"). Unless and until Petitioner does so, this Court
15 should not reach the merits of Petitioner's claims. See Rose v.
16 Lundy, 455 U.S. 509, 522 (1982).²

17 ///

18 ///

19 ///

20 ///

21
22 ² In Rhines v. Weber, 544 U.S. 269, 277-78 (2005), the
23 United States Supreme Court held in that, in "limited
24 circumstances," a district court has discretion to stay and hold
25 in abeyance a mixed habeas corpus petition pending exhaustion of
26 state remedies. Rhines v. Weber has no applicability to a
27 completely unexhausted petition such as the Petition here. See
28 Rasberry v. Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006); see also
Jiminez v. Rice, 276 F.3d 478, 481 (9th Cir. 2001), cert. denied,
538 U.S. 949 (2003) ("Once [respondent] moved for dismissal, the
district court was obligated to dismiss immediately, as the
petition contained no exhausted claims.") (citation and internal
quotations omitted).

RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition without prejudice.³

DATED: July 7, 2008.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

³ The Court assumes, arguendo, that federal habeas corpus is an appropriate vehicle through which to challenge the involuntary out-of-state transfer of California state prisoners. But see Crawford v. Bell, 599 F.2d 890, 891 (9th Cir. 1979) ("According to traditional interpretation, the writ of habeas corpus is limited to attacks upon the legality or duration of confinement").

1 **NOTICE**

2 Reports and Recommendations are not appealable to the Court of
3 Appeals, but may be subject to the right of any party to file
4 objections as provided in the Local Rules Governing the Duties of
5 Magistrate Judges and review by the District Judge whose initials
6 appear in the docket number. No notice of appeal pursuant to the
7 Federal Rules of Appellate Procedure should be filed until entry of
8 the judgment of the District Court.